No. 8686

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARCHIE POULAS,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF ARCHIE POULAS, APPELLANT

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

EDWARD H. CHAVELLE,
Attorney for Appellant.

315 Lyon Building
Seattle, Washington

INDEX

INDEX TO CITATIONS

No. 8686

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARCHIE POULAS,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF ARCHIE POULAS, APPELLANT

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

STATEMENT OF THE CASE

This appeal arises out of the indictment of the defendant, Archie Poulas, for the violation of Sections 1287 and 1441, Title 26, U. S. C. A.

The defendant entered a plea of "not guilty" to both counts of the indictment and thereafter petition to suppress the evidence was duly and regularly filed and argued and the petition denied. An exception was made to the Court's ruling denying the petition to suppress and exception allowed. Thereafter the case was called for trial and the government elected to go to trial on Count I and moved to dismiss Count II of the indictment. The motion was granted and Count II was dismissed. Defendant renewed the motion to suppress the evidence as to Court I, the motion was denied and the defendant's request was allowed as to an exception to the Court's ruling.

The Court proceeded with the trial of the case and witnesses were sworn, examined and plaintiff's exhibit numbered one was admitted in evidence to which defendant objected and exception was requested and allowed, and thereupon the plaintiff rested its case in chief.

The defendant challenged the sufficiency of the evidence on the ground that the Court had erred in failing to grant the petition to suppress and the defendant moved for an instructed verdict of not guilty

as to Count I, and the motion was denied, exception requested and allowed. Defendant rested and plaintiff rested without offering any testimony.

Defendant again resumed the challenge to the sufficiency of the evidence and for the reason that the court erred in denying the petition to suppress the evidence and the defendant's request was allowed an exception to the Court's ruling.

Thereafter the case was argued to the Jury and the defendant renewed the motion which was denied and request for the exception was allowed by the Court.

The Jury retired and found the defendant guilty on Count I of the indictment.

Thereafter a motion for an arrest of judgment and for a new trial was regularly made and denied and exception requested and allowed and the defendant was sentenced to twenty months at the United States Penitentiary at McNeil Island, Washington, and to pay a fine in the sum of $200.00 and to be committed until said fine is paid.

STATEMENT OF FACTS

It was stipulated by counsel for the plaintiff and the government for the purpose of the record, that the investigators for the Alcohol Tax Unit, Bureau of Internal Revenue, Treasury Department of the United States, N. F. Strubin and E. T. Kelly, had no search warrant. That there was no search warrant.

Investigators, Strubin and Kelly, drove alongside the defendant's car which was standing still and asked him what he had in the car and the investigators allege that the defendant answered that he had moonshine in the car. (T. p. 34)

They saw no moonshine in the car until they searched for it. The contraband could not be seen from the outside as it was under an automobile blanket and in a gunny sack. (T. p. 34) The liquor was between the front seat and the back seat of the car. The blanket completely covered the object. (T. p. 39, 40) The investigators did not know what was under the blanket until they raised it. They did not know what was in the gunny sack until they opened it. The

defendant at the time of the search and seizure was acting in an apparently lawful manner and there was nothing in the defendant's car as the officers came alongside of it that would indicate the fact that it contained contraband until they searched it. (T. p. 43)

As its first witness the government called investigator, Strubin, who stated that the car was standing still at the time of the search and seizure and that no contraband could be seen from the outside as it was under an automobile blanket and in a gunny sack. (T. p. 34)

E. T. Kelly, investigator, was then called as a witness and he testified that he drove alongside of the defendant's car when it stopped; that there was a blanket covering some object in the back of the car; that he removed the blanket and found a gunny sack inside of which there were five one-gallon jugs of moonshine. (T. p. 34)

On cross-examination, Kelly testified that he had been looking for the defendant's car from February 9th to February 17th; that he was looking for a particular individual, namely, Archie Poulas and was

also looking for a particular car, a 1934 Oldsmobile sedan, license No. A-25-809. (T. p. 43)

That he had not only had information from the 9th of February to the 17th of February, 1937, but that he had not secured a search warrant or made application for one nor did he know of anyone else who might have made application for a search warrant in connection with the search and seizure; that there was nothing in the defendant's car as he came alongside of it, which would indicate that there was any contraband until he searched the car and found the blanket over the gunny sack in which there was moonshine. (T. p. 43)

That the defendant was not doing anything which would indicate that he was violating the law; that he could not see what was in the car until he had searched it. (T. p. 43)

THE QUESTION ON APPEAL

The question on this appeal is whether the Court erred in refusing to suppress the evidence.

ASSIGNMENTS OF ERROR

I.

That the court erred in overruling the motion of the defendant to suppress the evidence, which motion was made before the case was called for trial upon the ground and for the reason that the evidence was secured by unlawful search and seizure. That timely exceptions were taken to the actions of the court in denying the motion to suppress the evidence and that the petition to suppress the evidence was timely made.

II.

That the Court erred in allowing testimony to go to the jury in the trial of the case, over the objection of the defendant's counsel, as to statements made by the defendant, and as to the surrounding circum-

stances as part of the *res gestae*, for the reason that said evidence was secured through said unlawful search.

III.

That the Court erred in allowing testimony to go to the Jury in the trial of the case, over the objection of the defendant's counsel, which was excepted to and said exceptions were allowed.

IV.

That the Court erred in denying the challenge to the sufficiency of the evidence in Count I of the indictment, Count II having been dismissed upon the motion of the plaintiff, for the reason and upon the ground that sufficient evidence had not been produced to constitute a crime.

V.

That the Court erred in overruling the motion of the defendant for a directed verdict of acquittal, made at the close of the entire cause, and before it was submitted to the Jury, which motion was based upon the ground that there was no evidence offered except that secured by illegal search and seizure.

VI.

That the Court erred in denying the motion to dismiss Count I of the indictment at the close of the plaintiff's case.

VII.

That the Court erred in denying a renewal of the petition to suppress the evidence at the end of the whole case.

VIII.

That the Court erred in denying defendant's motion for a directed verdict after the plaintiff and defendant had rested their cases.

IX.

That the Court erred in denying the motion of the defendant for a new trial, which motion was made in due time after the jury had returned a verdict upon Count I of said information.

BRIEF OF THE ARGUMENT

To justify search, evidence of senses must indicate commission of crime. The majority of cases hold that no general right exists to stop automobiles and search them without warrant. Under the Federal rules and the State statute, to justify search and seizure or arrest without warrant, the officers must have direct personal knowledge through their hearing, sight or other senses of the commission of the crime by the accused.

Elrod v. Moss, 278 Fed. 123

If the officers had no real belief that a violation of law had been discovered and if in the opinion of the court this belief was not based upon probable cause, the arrest is not legal, the search is not effective and the evidence obtained thereby may not be availed of. Officers should be very loathe to interfere with the rights of citizens and should not arrest on mere suspicion and whenever an arrest and subsequent search of a person or vehicle is made without warrant, the government must be prepared to show, if it expects the evidence to be admissible, that the arrest and

search was not a mere exploratory enterprise for the purpose of discovery, but was based upon a sincere belief, with reasonable grounds therefor, that an offense had been committed by the person or vehicle arrested.

U. S. v. Rembert, 284 Fed. 996

Moreover, the legality of the arrest and the search must be determined by the facts as they are known to the officer at the moment the arrest was made or the search instituted and can never be justified by what has been found. A search that is unlawful when it begins, is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying on the chance of discovery that the Fourth Amendment was passed to protect the people.

U. S. v. Slusser, 270 Fed. 818
U. S. v. Kaplan, 286 Fed. 963

In the Kaplan case, Judge Barrett, speaking for the Court, said:

> "The fact of finding liquor by reason of the search of either suitcase or automobile cannot be justification for a search that was made without

> a lawful warrant or without probable cause for believing that a crime was being committed in the presence of the officer.

In *U. S. v. Myers*, 287 Fed. 260, Justice Evans, speaking for the Court, said:

> "It seems entirely clear that evidence obtained in the manner shown here cannot be used against the defendant without an energetic disregard of the 5th Amendment to the Constitution."

In *Hernandez v. U. S.* (C. C. A. Calif. 1927) 17 F. (2d) 373 this Honorable Court held that the arrest without warrant was without probable cause and the contraband found on search inadmissible.

Mere suspicion does not justify arrest and search without warrant.

U. S. v. Wiggins, (D. C. Minn. 1927) 22 F. (2d) 1001

Search and seizure of a truck without warrant or previous information held unlawful and not aided by statement of driver after officers were in possession of truck.

U. S. v. Hanley (D. C. N. Y. 1931) 50 F. (2d) 465

Where officers before entering defendant's farmyard knew no facts justifying them as reasonably discreet and prudent men to believe that defendant had liquor in his automobile and they followed him and saw keg in automobile after entering, search and seizure was illegal.

Kroska v. U. S. (C. C. A. Minn. 1931) 51 F. (2d) 330

Farmyard which prohibition officers entered without warrant constituted "curtilage" of defendant's home.

Kroska v. U. S. (C.C.A. Minn. 1931) 51 F. (2d) 330

Search of an automobile without warrant is justified only by a probable cause which would be such as would establish before a competent tribunal a right to a warrant.

U. S. v. Blich, (D.C. Wyo 1930), 45 F. (2d) 627

Wherein the court held to be insufficient a showing, first, that the defendant had previously been convicted in the Municipal Court for violation of liquor ordinance, and, second, that prohibition agents had

been informed by reliable persons, whom they believed, that transportation was to take place at a certain time and place. The agents, however, refused to state the name of their informant.

Officers having no warrant and no reasonable cause to believe that automobiles contained liquor were without authority to stop and search automobiles far from the International border.

Mooring v. U. S. (C.C.A. Tex. 1930), 40 F. (2d) 267

Charge that search of automobile without warrant on report to officer that liquor would be transported to filing station was justified, held erroneous.

Brown v. U. S. (C.C.A. Fla. 1931) 47 F. (2d) 681

Test or probable cause for search and seizure is whether a reasonably discreet and prudent man would believe that liquor was being transported unlawfully in automobile. (Const. Amends. 4, 5),

Kaiser v. U. S. (C.C.A. Minn. 1932) 60 F. (2d) 410, *Certiorari* denied (1932), 53 S. Ct. 118, 287 U. S. 654, 77 L. Ed. 565.

Mere failure to offer forcible resistance to an officer, does not constitute consent.

U. S. v. Kozan (D.C. N. Y. 1930) 37 F. (2d) 415

Trier of facts should be slow in finding international and voluntary relinquishment of immunity from search without warrant when effect of testimony is uncertain.

U. S. v. Ruffner (D.C. Md. 1931) 51 F. (2d) 579

Consent given by owner to officers to search premises must be unequivocable and specific.

Karwicki v. U. S. (C.C.A. Md. 1932) 55 F. (2d) 225

Defendant's reply, "all right" when prohibition officers presented themselves and said that they would inspect premises, held not invitation to search.

U. S. v. Marra, (D.C. N. Y. 1930) 40 F. (2d) 271

Arrest of truck driver for violation, there being nothing to indicate such a violation, held unlawful and not to warrant search.

U. S. v. Valisco (D.C. N.Y. 1930) 41 F. (2d) 294

Officers information of illicit use of premises is purely hearsay and does not authorize search without warrant, unless based on personal observations or perceptions.

U. S. v. Shultz (D.C. Arz. 1933) 3 F. Supp. 273

Probable cause for seizing vehicle and searching same without warrant, must be based upon evidence leading man of prudence and caution to believe that vehicle was transporting contrabrand liquor.

Smith v. U. S. (C.C.A. N.J. 1933) 63 F. (2d) 831

Search after refusal of permission to search held unreasonable as being solely to verify suspicion and not incidental to lawful arrest.

De Pater v. U. S. (C.C.A. Md. 1929) 34 F. (2d) 275

An arrest made after an unlawful entry does not validate the entry.

Klee v. U. S. (C.C.A. Wash. 1931) 53 F. (2d) 58

The guarantees under the Fourth Amendment are to be liberally construed to prevent impairment of the protection extended.

Boyd v. U. S., 116 U. S. 616
Gouled v. U. S., 255 U. S. 298
Go-Bart Importing Co., v. U. S., 282 U. S. 344
Grau v. U. S., 287 U. S. 124
Sgro v. U. S., 287 U. S. 206

ARGUMENT

It was stipulated by the government that the investigators had no search warrant. (T. p. 39) It was admitted by witness, Kelly, that he and his partner Strubin, had been looking for the defendant's car from February 9th to February 17th, 1937 and during all of that time he knew the individual for whom he was looking and also had the description of the car for which he was looking and in which he expected to find liquor, and he stated that he had the information from the 8th day of February to the 17th of February as to the number of the car and had also seen the car and that the car was a 1934 Oldsmobile sedan, licence No. A-25-809. (T. p. 43)

That all of this information was within the knowledge of the officers for a period of at least eight or nine days previous to the arrest but rather than procure a search warrant they preferred to put into the mouth of the defendant his admission that he had "moonshine whisky". (T. p. 38)

It is evident that there is no way of protecting the Constitutional rights of any person, if it is possible for the officers to justify their procedure in ignoring these rights, merely by putting into the mouth of the deefendant a confession.

It simply does not ring true, that an apparently law abiding citizen should answer an inquiry as to what he had in the car that it is "moonshine whisky", when there is nothing evident as to the sight or other senses. There is no necessity of ever having a search warrant. In fact, it is much better not to have a warrant. There is no need of making a showing of probable cause. It would avoid liability for an illegal and unlawful search and seizure. To violate the Constitutional rights of a citizen, it is only necessary to say that he had stated that he was violating the law.

It is a dangerous practice to establish as a precedent that the need of a search warrant is avoided and illegal and unlawful search and seizure justified by supplying by their unsupported word, an element which should have been incorporated in the application for the warrant.

Clearly, there is in the record no foundation in fact or in law that would have justified the illegal search and seizure.

The present state of facts are not analogous to the cases where it is apparent by relying upon the senses of sight and hearing that a crime is being committed and there is no time to get a search warrant, because the violator would escape.

In this case the officers substituted their word in lieu of orderly procedure when they knew the make of the car, the year and the license number and the identity of the defendant and had known these facts for nine days before the search and seizure.

The only justification for the failure to procure a search warrant is because of the defendant's alleged admission and the investigators, Strubin and Kelly, do not even agree as to what was alleged to have been said

to them. One said that he heard the defendant say that he had "moonshine whisky". (T. p. 38), and the other said that the defendant replied that he had "moonshine'.. (T. p. 36)

What excuse could the officers possibly have for not securing a search warrant? They knew the description of the car and the identity of the individual for whom they were looking and had the information at hand for nine days, but preferred to rely upon a statement that it would be so easy for them to manufacture, and so hard for the defendant to contradict, namely, that the defendant had said that he had "moonshine whisky" in the car.

Under these circumstances, anyones automobile could be searched and if nothing was found the investigators could avoid all of the responsibility incident to the making of an affidavit showing probable cause and the procuring of a valid search warrant and the proper service of the warrant.

If, on the other hand, without a search warrant and in violation of an individual's Constitutional rights, they found contrabrand, they merely have to state that he told them that he had it in the car. It simplifies the

procedure and the necessity of securing a valid search warrant by simply asking a person what he had in his automobile and the person immediately responding that he had whisky. It does not matter that the person is proceeding about his business in an orderly and apparently lawful manner and that there is nothing in his actions which would arouse the suspicions of the officers as to the violation of the law; or the fact, that there is nothing to which the senses could be directed of sight or hearing which would indicate any violation of the law.

It must be admitted by the government that the search and seizure would be unlawful and illegal if the alleged statement of the defendant is not relied upon.

The defendant is compelled to incriminate himself, so that this search may be lawful. He hasn't the protection of the Court to protect his legal rights, but is at the mercy of a couple of investigators trying to bolster up a search that is unlawful on its face, by the defendant's own words.

The methods adopted by investigators contenance as just, the shooting from the blind, snaring or trapping and inducing crimes to be committed, but has not yet justified the barbarous procedure of merely saying that he told me so, and so depriving an individual of his Constitutional rights.

CONCLUSION

This Court should correct the errors, and grant the appellant a new trial of his cause.

Respectfully submitted,

EDWARD H. CHAVELLE,
Attorney for Appellant